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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

R. M. POWELL et al.,
Petitioners,
vs.
THE UNITED STATES CARTRIDGE COMPANY, a Corporation,
Respondent.
No. 96.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

This case is here on writ of certiorari granted by this Court to review a judgment of the United States Court of Appeals for the Eighth Circuit. The opinions below will be found at pages 982 to 1006 of the record and are reported in 174 F. (2d) 718.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 7, 1949 (R. 1037-9). The petition for certiorari was filed June 3, 1949, and was granted on October 10, 1949. The jurisdiction of this Court is invoked under Title 28, U. S. C. A., Sec. 1254, being a revision of Section 240 (a) of the Judicial Code as amended (Title 28, U. S. C. A., Sec. 347). And see cases cited in **Petition for Writ of Certiorari** under heading **Reasons for Granting Writ.**

STATEMENT.

This suit was brought May 4, 1945, by fifty-nine plaintiffs, petitioners here, while the plant was still operating and petitioners were still employed in the Safety Department as a working group. The plant opefated under the Fair Labor Standards Act, and it was part of the contract of employment that the standard work week should be forty hours and the standard work day eight hours, and if "production demands require a longer work day, or longer work week, the Company will pay the legal overtime rate as provided under the Walsh-Healey Act and the Fair Labor Standards Act" (Plffs. Ex. C-3, R. 188, 189 and 206, under title "Standard Hours of Work"). Production demands did so require and petitioners were required to work a six-day week (R. 316, 332) and for part of the time eight and one-half hour shifts (R. 65, 301, 332, Plffs. Ex. G, R. 214). This forty-eight hour minimum work week was pursuant to Executive Order No. 9301 signed by the President February 9, 1943, and thereafter in effect throughout the war (8 Fed. Reg., p. 1825, R. 1021 to 1022). By this directive the President directed all departments and agencies of the Federal Government to require their contractors to establish a forty-eight hour minimum work week in the war plants, and it was by virtue of this Order that these petitioners were required to work a six-day week, and it was expressly provided in the Order that it should not be construed as suspending or modifying the Fair Labor Standards Act. We quote from Paragraph 5 of the Order as follows:

> "5. Nothing in this Order shall be construed as superseding or in conflict with any Federal, State or local law limiting hours of work * * * nor shall this Order be construed as suspending or modifying any

provisions of the Fair Labor Standards Act (Act of June 25, 1938; 52 Stat. 1060; 29 U. S. C. 201 et seq.) or any other Federal, State or local law relating to the payment of wages or overtime."

Respondent refused to pay for this overtime because it claimed that the petitioners were employed in an administrative capacity, as that term is defined and delimited by the Regulations of the Labor Administrator, and, therefore, under Section 13-A of the Act, they were exempt from the benefits of the minimum wage and maximum hour provisions of the Act (29 U. S. C. A. 213-A). Petitioners protested this classification (R. 303, 304, 306, 452, 952), and while still working at the plant brought this suit to obtain a ruling on this claimed exemption.

Petitioners prevailed in the District Court (see Findings of Fact, Conclusions of Law and Judgment, R. 916 to 922). The Court of Appeals for the Eighth Circuit reversed (174 Fed. [2] 718) on the ground that the Fair Labor Standards Act and the Walsh-Healey Public Contracts Act were mutually exclusive; that petitioners were within the coverage of the Walsh-Healey Public Contracts Act, and, therefore, could not recover under the Fair Labor Standards Act. The concurring opinion rests in part on the additional concept that the prime contract read in the light of the Act of July 2, 1940, makes the Walsh-Healey Public Contracts Act the sole arbiter of petitioners' rights. It is these rulings that are here under review. The petition raises the additional question of whether or not the products produced at this plant were "goods" and were "commerce" within the meaning of the Fair Labor Standards Act.

The respondent operated this plant under a cost-plus-a-fixed-fee contract with the War Department (Deft. Ex. 20, R. 762 to 800). The pertinent parts of this contract are as follows:

Title III, Article III-A (R. 780) defines the status of the contractor as follows:

> "It is expressly understood and agreed by the Contractor and the Government that in the performance of the work provided for in this contract, the Contractor is an independent contractor and in nowise an agent of the Government."

And it further provided that the Contractor should—

> "make all * * * contracts in its own name and not bind or purport to bind the Government or the contracting officer thereunder" (R. 787).

The contract also by way of recital (R. 764) expressed the Government's desire "to have the contractor, as an independent contractor, on a cost-plus-a-fixed-fee basis, make all necessary preparations for the operation of said plant * * * and operate said plant."

It further provided, Title III, Article III-D, (a) (R. p. 783):

> "(a) The Contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract."

And also provides that the contractor's overhead, including salaries of its executive officers, interest on capital employed, and expenses of main and branch offices, and all overhead except such as is specifically authorized in Section 1, Article II-A, Title II, was **not** to be reimbursable (Title II, Art. II-A-3, R. 775). The contractor was further required to do all things necessary to operation, to hire all employees and provide, with certain exceptions, all materials, and to provide for storage at the plant and the loading of the ammunition on carriers for shipment in

accordance with the Government's shipping instructions (Defendant's Exhibit 20, Title I, Article I-E, R. pp. 770-71). And in the following Article I-F (R. p. 771), the contractor was required to inspect and check all material by its own inspectors before submitting the goods to the Government for approval (R. p. 771). The contractor was also required to keep records and books of account showing the cost of all labor, material and other expenditures (Article III B-1, R. p. 788), and the contract contemplated payment by the contractor of contributions under the Federal Social Security Act, and all state and local taxes, licenses or fees required by state law (Title II, Article II-A [i], R. p. 773), including state compensation laws (Title III, Article III-J, R. p. 790), and the contractor was required to "obey and abide by" all applicable laws and regulations of the United States, or any state, territory or subdivision thereof (Title III, Article III-F [b], R. pp. 786-7).

The raw materials and work in process were at all times in the physical possession of the contractor and under its control for all manufacturing purposes.

Supplement No. 11 of the Contract, Article III-Y (R. 833), expressly so states. This physical possession continued until after manufacture was complete and the goods inspected and accepted by the Government, and since the contractor was required to load the ammunition on cars or other carriers in accordance with the Government's shipping instructions (R. 771), we contend that the ammunition did not come into the physical possession of the government prior to arrival at destination. We excerpt from the Contract, Supplement No. 11, Article III-Y (R. 833), as follows:

> "It is recognized that property (including without limitation machine tools and processing equipment,

manufacturing aids, raw, manufactured scrap and waste materials) title of which is or may be hereafter become vested (ib) the Government, will be used by or will be in the care, custody or **possession** of the Contractor in connection with his performance of this contract. The Contractor may, with the approval of the Contracting Officer, transfer or otherwise dispose of such Government-owned property to such parties and upon such terms and conditions as the Contracting Officer may approve or ratify." (Emphasis ours, here and elsewhere in this brief.)

Also, Title I, Article I-E (R. pp. 770, 771), to-wit:

"In carrying out the work under this Title I the Contractor is authorized to do all things necessary or convenient in and about the operating and closing down of the Plant, or any part thereof, including (but not limited to) the employment of all persons engaged in the work hereunder **(who shall be subject to the control and constitute employees of the Contractor)**, the providing of all materials except such materials as the Government is to furnish or supply, as elsewhere specifically provided herein the storage of raw materials and supplies and of finished ammunition to the extent of the storage facilities at said Plant, and the loading of ammunition on cars or other carriers in accordance with the Government's shipping instructions."

Also, Title III, Article III-G (R. 788):

"The Contractor agrees to keep records and books of account on a recognized cost-accounting basis, showing the actual or agreed cost to it of all items of labor, materials, equipment, supplies, services, and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract."

Also, Title III, Article III A-2 (R. 781):

> "If this contract is terminated due to the fault of the Contractor, the Contracting Officer may enter upon the premises and take possession of the Plant, and all manufacturing facilities, materials, work finished or in process, and supplies, title to which has been acquired by the Government under this contract."

It is thus clear that appellant had actual physical possession not only of the raw materials and work in process, but of the plant as well, and that its right to possession continued until termination of the Contract.

It should be stressed that the ammunition produced at this plant was not shipped by the Government; the Government merely "directed" the shipments. The actual shipping was done by employees of contractor (R. 771 and Answer to Interrogatories No. 11 [R. 38]). In short, the whole elaborate set-up was for the express purpose of making it clear that the contractor and not the United States was the employer and the producer.

The pleadings admit, and the opinion below concedes, that the petitioners were all employees of respondent (R. 30, 983).

Respondent produced as an independent contractor under the above contract literally billions of bullets and vast quantities of waste brass. It employed as high as forty thousand men in the operation and maintenance of this vast industrial enterprise. The plant was equipped with all requisite loading, unloading, switching and shipping facilities for the handling of interstate freight, all maintained by respondent's employees (R. 37). Respondent's crews operated the switch engines (R. 38). Its employees packed and loaded all outgoing freight and unloaded all incoming freight, maintained all loading and unloading

facilities, and prepared bills-of-lading and shipping papers (R. 332, 333). The principal raw materials used were brass, powder, lead and steel (R. 37). These moved into the plant in a steady stream from all parts of the United States, and were purchased from more than two thousand vendors located within and without the State of Missouri, and moved into the plant by the instrumentalities of interstate commerce (R. 37). Outbound shipments were of two kinds—the ammunition and the waste brass. With only one or two exceptions, the ammunition moved out at Government direction to various Government depots and to ports for shipment. Knowledge that this ammunition was produced for interstate shipment was admitted by respondent in numerous plant publications, and was a matter of common knowledge at the plant (Plffs. Exs. D and E-1 to E-7, R. 381 to 384).

Interwoven with the production of the bullets was the production of a by-product waste brass (R. 356, 359). This waste brass was created at the plant in the manufacturing operation of making bullets (R. 357). The production of the waste brass was interwoven with the production of the bullets. Hence all employees necessary to the production of bullets were also necessary to the production of waste brass. This waste brass was all shipped out as purely private shipments by the respondent, United States Cartridge Company, to Western Cartridge Co., in East Alton, Illinois, on ordinary commercial bills-of-lading, the same as are used by any industrial shipper in interstate commerce (see testimony of Hughes, R. 356 and 359, and testimony of Eifert, R. 346). This movement was continuous and substantial, averaging eighteen truckloads a day (R. 358).

The statement in the opinion below (174 Fed. [2], l. c. 720) to the effect that the title to this by-product "appears to have remained in the Government" is not sup-

ported by any evidence in the Record. There is no proof that any of this brass was shipped at Government direction or for any war purpose. The uncontradicted evidence is that they were ordinary, private commercial shipments by respondent to its own affiliate in East Alton, and the inference is that respondent acquired title to this waste product by some arrangement with the contracting officer, and shipped it to its affiliate in East Alton, Illinois, for its own commercial purposes (see Contract, Supplement 11, Defendant's Ex. 24, Article IIb, R. 825, 833). We will contend that both the bullets and the waste brass were produced for "commerce". If either were so produced, it should be sufficient to bring petitioners within the language of the Act.

These petitioners were called inspectors or engineers, the terms being interchangeable. It was their duty to patrol the various units of the plant and note and report infractions of safety rules. These rules were prescribed by management, and in the making of them the inspectors had no voice (R. 410, 411, 876, 877, 878, 904, 905, 400, 401), and ordinarily the inspector was without authority to take any corrective action in the matter himself (R. 70). They were also required to make out accident reports. A more detailed description of their duties appears in a manual prepared by management and handed to each petitioner on employment (Plffs. Ex. F, R. 69 to 71). They were merely inspectors and clerks without any administrative or executive authority.

STATUTES INVOLVED.

The United States Statutes Involved are:

The Fair Labor Standards Act, 29 U. S. C. A., Sections 201 to 219.

The Walsh-Healey Act, 41 U. S. C. A., Sections 35 to 45.

The First National Defense Act, enacted June 28, 1940; 50 U. S. C. A., Appendix 1151 et seq.

The Second National Defense Act, enacted July 2, 1940; 50 U. S. C. A., Appendix, Section 1171 et seq.; also 5 U. S. C. A., Section 189 (a).

SPECIFICATIONS OF ERROR.

The Court of Appeals for the Eighth Circuit erred:

1. In holding that the Fair Labor Standards Act and the Walsh-Healey Act are so divergent that both may not apply at one and the same time (R. 995).

2. In holding that the Walsh-Healey Act controlled petitioners' employment to the exclusion of the Fair Labor Standards Act.

3. In holding that petitioners were not within the coverage of the Fair Labor Standards Act.

4. In holding that the provisions of the prime contract (Deft. Ex. 20, R. 783) made the Walsh-Healey Act applicable to the exclusion of the Fair Labor Standards Act.

5. In holding that the provisions of the Act of July 2, 1940, or any action of the Secretary of War thereunder, excluded petitioners from the benefits of the Fair Labor Standards Act.

6. In not holding that employees at the St. Louis Ordnance Plant engaged in the production of goods for interstate commerce were within the coverage of the Fair Labor Standards Act.

7. In not holding that the munition and the by-products produced at the St. Louis Ordnance Plant were "goods" and were "produced for commerce" within the meaning of the Fair Labor Standards Act.

8. In holding that the United States District Court was without jurisdiction to grant relief under the Fair Labor Standards Act.

SUMMARY OF THE ARGUMENT.

I.

We contend that the fundamental error in both opinions below rests in the assumption that the application of the Walsh-Healey Act excludes coverage under the Fair Labor Standards Act. This assumption is contrary to the language of both enactments, their legislative history, departmental interpretation and court decisions. Contrary to the rulings below, we urge that Federal regulation of wages and hours is contained not only in the Fair Labor Standards Act of 1938, but also in a series of Government contract laws, some of which are the Walsh-Healey Public Contracts Act, the Davis-Bacon Act, the Eight-Hour Law, and the Act of July 2, 1940. Coverage under the Government contract laws does not depend on the same factors as coverage under the Fair Labor Standards Act. In enacting the Fair Labor Standards Act Congress exercised its power under the commerce clause of the Constitution, and hence the coverage is limited under that Act to employees engaged in commerce or the production of goods for commerce. On the other hand, the series of Public Contracts Acts, not having been enacted under the commerce clause of the Constitution, engagement in commerce or the production of goods for commerce is not a prerequisite to coverage. These enactments, however, all form a pattern and have the same general objective which is to raise labor standards in their respective fields. Necessarily, these fields overlap where workers who are covered under Government contract laws are also engaged in commerce or the production of goods for commerce. They are not, however, repugnant and neither excludes the other, and a Government contractor is not excused from compliance with the Fair Labor Standards Act where he is engaged in commerce or the

production of goods for commerce, whenever the standards set by the Fair Labor Standards Act are stricter than the provisions of the several Public Contract Acts. Sub-standard labor conditions affecting employees of Government contractors are just as deleterious and as much the concern of Congress as in industry generally, and Congress made no exception in the Fair Labor Standards Act in respect to them [Brooks v. United States (Dec. May 16, 1949), 93 L. Ed. 884; Walling etc. v. Patton-Tulley Transportation Co., 134 F. (2d) 945 (6th Cir., Dec. 1943); Lasater v. Hercules Powder Co. (D. C. E. D. Tenn., July 25, 1947), 73 F. S. 264]. Nor does the Act of July 2, 1940, suspend the operation of the Fair Labor Standards Act, and any contrary contention is refuted not only by the terms of the Act of July 2, 1940, itself, but also by its legislative history, and the circumstances surrounding its enactment.

II.

We contend that munitions manufactured at the St. Louis Ordnance Plant were "goods," and that they were "produced for commerce" within the meaning of the Fair Labor Standards Act. Section 3 (d) of the Fair Labor Standards Act to the effect that it shall not include the United States does not exempt employees of a private contractor operating a munitions plant under a cost-plus-a-fixed-fee contract with the United States. The adjudicated cases establish that employees who work for those who contract with the Government are not the Government's employees even though the economic burden falls on the Government through a cost-plus-a-fixed-fee arrangement, and even though the Government may exercise a supervisory control over the performance of the contract. The contract here in evidence provides that the employees shall be subject to the control and constitute employees of the contractor. It subjected the contractor to many statutes in-

applicable to Government employees, and to accept the argument of the respondent herein would be to hold in effect that the employees of such contractors are Government employees for purposes of the Fair Labor Standards Act, but not with reference to anything else. We contend further that munitions produced at a Government owned plant under a cost-plus-a-fixed-fee contract, and intended to be transported across state lines for war purposes, are produced for commerce within the meaning of the Fair Labor Standards Act, even though the title to the goods is in the Government and the shipments are at Government direction. We also contend that a private contractor operating a cost-plus-a-fixed-fee arrangement is not an agency of the United States and does not share any of the Government's sovereign immunities, and that the goods here produced are produced for commerce within the meaning of the Fair Labor Standards Act [Bell v. Porter, 159 Fed. (2) 117 (7th Cir.); Umthun v. Day & Zimmerman, Inc., 235 Ia. 293, 16 N. W. (2) 258; Jackson v. Northwest Airlines, 75 Fed. Supp. 32; Timberlake v. Day & Zimmerman, Inc., 49 Fed. Supp. 28; Moehl v. Du Pont de Nemours & Co., 6 W. H. Cases 638, 12 Labor Cases No. 63545; Clyde v. Broderick, 144 Fed. (2) 348; U. S. v. Driscol, 96 U. S. 421; Alabama v. King & Boozer, 314 U. S. 1].

III.

We contend further that Section 3 (i) of the Act exempting goods after their delivery into the actual physical possession of the ultimate consumer does not apply to manufacturing operations which occurred before the goods came into the actual physical possession of the United States, and that the goods produced at the St. Louis Ordnance Plant were goods within the meaning of the Fair Labor Standards Act [Hamlet Ice Co. v. Fleming, 127 F. (2) 165; Jackson v. Northwest Air Lines, 75 F. S. 32, l. c. 40, par. B et seq.].

IV.

Involved in this question of commerce are the facts shown in the record establishing that there were produced at this plant large quantities of waste brass that were shipped in interstate commerce for purely commercial purposes. The production of this by-product was interwoven with the production of ammunition, and in the production of this by-product appellees were unquestionably engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, and since the production of the waste brass was interwoven with the production of the ammunition, it comes within the principle that where a transaction claimed not to constitute commerce is commingled with those which are undoubtedly commerce, the regulatory Federal power under the commerce clause extends to all [Walling v. People's Packing Co., 132 Fed. (2), 10th Cir. 236, syl. 6, 7 and 8, and l. c. 240].

ARGUMENT.

SPECIFICATION OF ERRORS NUMBERS 1, 2 AND 3.

I.

The Fair Labor Standards Act and the Walsh-Healey Act Are Not Mutually Exclusive.

The assumption in both opinions below that the Walsh-Healey Act excludes coverage under the Fair Labor Standards Act is contrary to the language of both enactments, their legislative history, long standing departmental interpretation, and all court decisions on the point. It is not limited to cost-plus war contractors, but apparently would also apply to peacetime contractors with the Government; and their employees, engaged in commerce or in the production of goods for commerce, would, under the ruling below, be likewise excluded from the benefits of the Fair Labor Standards Act.

The Walsh-Healey Act was enacted June 30, 1936 (41 U. S. C. A. 35-45). The Fair Labor Standards Act was enacted June 25, 1938 (29 U. S. C. A. 201-209). Congress was thus aware of the existence of the Walsh-Healey Act and numerous other enactments in the field of public contracts and labor relations. Congress made express provision against any possible limitation of the Fair Labor Standards Act by reason of these enactments, to-wit: Section 18 provides that no provision of the Act shall excuse non-compliance "with any federal or state law or municipal ordinance" establishing a higher minimum wage or a lower maximum work-week (29 U. S. C. A. 218). Further, by Section 13 Congress expressly excluded from the scope of the Fair Labor Standards Act employees covered by certain other acts, to-wit: employees subject to regulation under the Railway Labor Act [Sec. 13 (a) (4)], or any

employee with respect to whom the Interstate Commerce Commission has power to regulate maximum hours, under the Motor Carrier's Act or the Interstate Commerce Act [Sec. 13 (b) (1) (2)]. The failure of Congress to make similar provision for the exclusion of employees covered by the Walsh-Healey Act, is a clear indication that Congress did not intend that they be excluded if otherwise within the coverage of the Fair Labor Standards Act.

Further, on May 13, 1942 Congress amended the Walsh-Healey Act providing for the exemption of employers who entered into agreements with their employees "pursuant to the provisions of Pars. 1 or 2 of subsection (b) of Section 7 of an Act entitled 'Fair Labor Standards Act of 1938'" [56 Stat. 277; 41 U. S. C. A., 35 (c)]. It is apparent that Congress thus recognized that the two statutes could overlap, and that certain employees came under both Acts, because if the two Acts could not apply at the same time, as the Court below ruled, there would have been no reason whatever for this amendment. Further, the application of the Fair Labor Standards Act to employees of cost-plus-a-fixed-fee contractors in the war plants was definitely recognized by Congress in the amendment to the Fair Labor Standards Act enacted May 14, 1947, known as the Portal-to-Portal Act of 1947. One of the stated purposes of that Act was to invalidate portal-to-portal claims by employees under the Fair Labor Standards Act because of the "increased cost of war contracts" [Public Law 49, 80th Congress, Chap. 52, 1st Sess., 29 U. S. C. A. Pocket Part 251 (a) (9)].

In addition to all this, it appears that for more than ten years the Department of Labor has consistently interpreted the two Acts on the theory that they were not repugnant, and that application of both Acts to employees of government contractors who were engaged in commerce or the production of goods for commerce was in harmony

with the common objectives pursued by Congress in enacting both types of labor regulation. As pointed out in the brief for the Administrator of the Wage and Hour and Public Contracts Division of the Department of Labor filed below in support of the petition for a rehearing (R. 1028-1031) Congress was repeatedly made aware of the Department's interpretation, and with that knowledge made appropriations for enforcement. This has been held to be a confirmation and ratification of the administrative interpretation. Brooks v. DeWar, 313 U. S. 354, 361; Fleming v. Mohawk Co., 331 U. S. 111, 116.

Further, the uncontradicted evidence in this case discloses that the parties themselves interpreted the two Acts as having concurrent application. All employees of the respondent on their employment were given a booklet in which the Company's labor policies were set out, and in that booklet it was expressly stated, to-wit (Plffs'. Exhibit 3-C, R. 188, 189, 206):

> "There will be eight hours in any working day, and forty hours will constitute a working week. To meet the schedule required of us by the National Defense Program, it will be necessary to employ three shifts on production operations. When production demands require a longer work day, or longer work week, the Company will pay the legal overtime rate as provided **under the Walsh-Healey Act, and the Fair Labor Standards Act.** When three shifts are operating there will be rotation of the first, second and third shifts every two weeks. A lunch period will be allowed on each shift and will be paid for by the Company, that is, no deduction will be made for this lunch period."

The Court decisions on the subject all reach a conclusion contrary to the ruling of the Court below herein, to wit: Walling etc. v. Patton-Tulley Transp. Co., 134 F.

(2d) 945 (6th Cir., decided 1943); Lasater v. Hercules Powder Co. (D. C. E. D. Tenn., July 25, 1947), 73 F. Supp. 264; Brooks v. United States (decided May 16, 1949), 337 U. S. 49, 93 L. Ed. 884.

The Walling case, supra, was an enforcement proceeding by the administrator to compel compliance with the wage and hour provisions of the Fair Labor Standards Act. It involved a public project being done on the Mississippi and Missouri Rivers by Patton-Tulley Transportation Company, under contract with the United States. The workers in question were "engaged in constructing and repairing dikes and revetments" in the channels of the Missouri and Mississippi Rivers (l. c. 946). It was urged in defense that the wage and hour provisions of the Fair Labor Standards Act with respect to the employees in question had been "superseded" (l. c. 948, top 2nd column) by an amendment to the Eight Hour Law enacted September 9, 1940 (40 U. S. C. A. 325a). The Eight Hour Law enacted June 19, 1912 (40 U. S. C. A. 324, 325) applied to public contracts, to-wit, every contract to which the United States was a party which required the employment of laborers and mechanics. The amendment of September 9, 1940, provided that "notwithstanding any other provision of law" work in excess of eight hours per day should be computed on the basic day rate of eight hours per day, and should be compensated for "at not less than one and one-half times the basic rate of pay." Section 7 of the Fair Labor Standards Act prohibits work in excess of forty hours per week unless compensated for at not less than one and one-half times the "regular rate," and prescribes no method of computing the regular rate. The District Court had ruled that these differences made the two enactments repugnant and inconsistent, and therefore concluded that the Eight Hour Law amendment superseded the Fair Labor Standards Act in respect to wages and maximum hours of the employees in question. The

Court of Appeals for the Sixth Circuit, however, disagreed. It found nothing repugnant in the two statutes, nor any difficulty in requiring compliance with both. We quote (l. c. 948) paragraph 6, to-wit:

> "We perceive no difficulty in the reconcilement of the Eight-Hour Law amendment with the Fair Labor Standards Act. The one limits employment at basic pay to 40 hours a week, the other deals solely with daily employment of men in certain classifications, and limits such employment at basic pay to 8 hours a day. No difficulty will be perceived in complying with both statutes—giving overtime pay for work in excess of the weekly maximum in the one case, and overtime pay for work in excess of the daily maximum in the other."

The Sixth Circuit then proceeded to rule that the Fair Labor Standards Act applied to work under Government contracts, remarking that this was **particularly true in war time** when most major industries were operating on Government contracts (l. c. 949):

> "Like the Fair Labor Standards Act, the Eight-Hour Law is one whose purpose it is to eliminate substandard working conditions. As such it should be given construction to effect such purpose. Overstreet v. North Shore Corp., supra. The argument that it was the Congressional intention to make the Fair Labor Standards Act inapplicable to work under government contract, must be rejected. No reason appears why contractors for the government are to be permitted to maintain substandard labor conditions while private contractors are prohibited from so doing, and such view would thwart the clearly defined purpose of the Congress, particularly if applied at a time when all, or nearly all, major industries are operating upon government contract."

We submit that the differences between the Fair Labor Standards Act applying to employees engaged in the production of goods for commerce, and the Walsh-Healey Public Contracts Act applying to employees engaged in the manufacture of materials, supplies, articles and equipment under public contract, are no greater than the differences between the Fair Labor Standards Act and the Eight Hour Law as amended September 9, 1940, applying to public contracts requiring employment of laborers and mechanics. Yet in the latter case the United States Court of Appeals for the Sixth Circuit, in Walling v. Patton-Tulley Transportation Co., had no difficulty in reconciling the two, and in giving effect to both at the same time, and on the same project. The opinion below is in direct conflict with the decision and rationale of the Sixth Circuit in the Walling case.

This precise question seems to have been raised in only one other case—Lasater v. Hercules Powder Company, decided by the District Court for the Eastern District of Tennessee, July 25, 1947, 73 Fed. Supp. 264. In the Lasater case the plaintiffs were employees of Hercules Powder Company that operated the Government-owned ordnance plant near Chattanooga, Tennessee, under a cost-plus-a-fixed-fee contract with the War Department for the manufacture of munitions. The action was brought under the Fair Labor Standards Act to recover overtime compensation, liquidated damages and an attorney's fee. The defendant disclaimed liability, among other reasons, because "the rate of pay and working conditions of the plaintiff were regulated by the Walsh-Healey Act, the Eight Hour Law, and the Davis-Bacon Act, and not by the Fair Labor Standards Act of 1938" (l. c. 267). The Court held, however, that the Fair Labor Standards Act was not restricted because of either of these previous enactments. In so holding the Court said (l. c. 268):

"From an examination of the Eight Hour Law, the Davis-Bacon Act and the Walsh-Healey Act, together with the Congressional history of labor laws raising standards of pay and working conditions, the conclusion is quite evident that the intended coverage of the Fair Labor Standards Act is not restricted because of these previous enactments. I deem it unnecessary to undertake to analyze the premises resulting in this conclusion.

"The Fair Labor Standards Act is applicable to work under government contracts. Walling v. Patton-Tulley Transp. Co., 6 Cir., 134 F. 2d 945."

As additional authority, we cite the decision of this Court rendered May 16, 1949, in Brooks v. The United States (Nos. 388 and 389, October Term, 1948), holding that the Tort Claims Act and the Veterans' Laws are not mutually exclusive. In reaching this conclusion this Court said (l. c. 887):

"Unlike the usual workman's compensation statute, e. g., 33 U. S. C. A., Sec. 905, 10 F. C. A., title 33, Sec. 905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. United States v. Standard Oil Co., 332 U. S 301, 91 L. ed. 2067, 67 S. Ct. 1604, indicates that, so far as third party liability is concerned. Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act, 5 U. S. C. A., Sec. 757, 2 F. C. A. title 5, Sec. 757. Thus Dahn v. Davis, 258 U. S. 421, 66 L. ed. 696, 42 S. Ct. 320, and cases following that decision, are not in point. Compare Parr v. United States (C. C. A. 10th, Kan.), 172 F. 2d 462. We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so."

See also C. C. H. Labor Law Rep., 4th Ed., Vol. 3, sec. 26011, supporting the proposition that the application of both laws, to-wit, Fair Labor Standards Act and Walsh-Healey Act, to employees of government contractors who are engaged in interstate commerce or in the production of goods for commerce, "is in harmony with the common objectives pursued by Congress in enacting both types of laws."

There is no factual basis whatever for the statement in the opinion below that the application of both acts would entail "confusion" (174 Fed. [2], 718, l. c. 725) and the statement is incorrect. Indeed, it appears from the brief of the Labor Department on the motion for rehearing below (R. 1026 to 1036) that this statement of the Court below is not borne out by more than ten years' experience in the administration and enforcement of both acts. Further, since all administrative and enforcement machinery is now set up on the assumption that the acts are consistent and mutually enforcing, the opinion of the Court below, if allowed to stand, would necessitate a change in all existing administrative and enforcement practices, together with a change in or modification of existing interpretations and regulations, and would throw the administration of both acts into the greatest confusion.

For all of the above reasons we submit that the decision below is untenable.

II.

The record affords no basis for the assumption in the opinion below that all petitioners were within the coverage of the Walsh-Healey Act, and that issue was not tried in the District Court.

While we have endeavored to point out above that if there was an overlapping of the Fair Labor Standards Act

and the Walsh-Healey Act with respect to petitioners, such overlapping would not exclude relief. We submit further, however, that these petitioners were not shown to be within the purview of the Walsh-Healey Act, and that the issue was not tried in the District Court. The Fair Labor Standards Act not only covers workers actually engaged in production, but also includes workers engaged "in any process or occupation necessary to the production thereof" (Section 3 [j]). The Walsh-Healey Act, on the contrary, does not contain such a clause, but its scope is limited to workers employed "in the manufacture or furnishing of the materials," etc. (Section 1 [b]). Petitioners were inspectors or engineers (these terms being interchangeable) in the Safety Department. They were required to patrol the units, inspect safety conditions, and report on violations of safety rules or unsafe conditions (see description of the duties of the safety engineers in the manual of instructions given by respondent to all petitioners marked (Plff. Ex. F, R. 68, 69 to 72). These duties were, of course, an occupation necessary to the production of the munitions within the meaning of Section 3 (j) of the Fair Labor Standards Act and the complaint so charges (R. 6), and the Court below so found (R. 917, par. 5). This work, however, was not necessarily employment "in the manufacture or furnishing of materials," etc., within the limited language of the Walsh-Healey Act.

Coverage under the Walsh-Healey Act is a question of fact which this Court has held must, in the first instance, be determined by the Secretary of Labor (Endicott-Johnson Corp. v. Perkins, 317 U. S. 501, l. c. 508, 509). Whether these petitioners, or any of them, were within the coverage of the Walsh-Healey Act was an issue of fact to be determined from the evidence in the light of the Secretary of Labor's Regulations. No interpretations have been issued that would include safety inspectors. (See Walsh-Healey

Public Contracts Act, Rulings and Interpretations No. 3, dated October 1, 1945, Sections 36, 37, 38 and 39). Interpreting these Regulations, respondent ruled that petitioners were all exempt from the Walsh-Healey Act. See Defendant's Exhibit 14, Record p. 611, in part, as follows:

> "(b) He is also exempt from the overtime provisions of the Walsh-Healey Act because the provisions of that Act are not 'deemed applicable to office or custodial employees'; Regulations, Article 102, A. J. McMahon, Occupational Analyst." (Appears only in the ten records filed with the Petition. See Stipulation, R. 1055.)

Petitioners' duties were largely office and clerical, particularly in making out their reports, and their activities in patroling the units and checking on safety conditions were of a custodial nature. They did not question respondent's interpretation of the above Regulation. In the District Court respondent did not plead the Walsh-Healey Act as a defense. The District Court made no finding of fact as to coverage under the Walsh-Healey Act. Respondent did not object to the failure to so find, and did not include the point in its Statement of Points to be relied upon on appeal (R. 963 to 971). Thus it appears that the Court below reversed this case on an issue of fact not pleaded in the answer as a defense (R. 30 to 32), not tried, and on which the trial court made no finding (R. 916), and not included by respondent in the points to be relied upon on appeal (R. 963), and hence not properly before it. And the conclusion of fact on which the court below grounded its opinion is not only without any factual basis in the record, but is contrary to the position taken by the parties themselves during the entire period of employment. Surely petitioners are at least entitled to a trial of this issue before being cast out of court.

For further discussion of this point see petition for rehearing below (R. 1013 [b] to 1015.)

III.

The Act of July 2, 1940.

SPECIFICATIONS OF ERROR NOS. 4 AND 5.

The concurring opinion suggests, but does not decide, that there is in the language of the Act of July 2, 1940, "a reservoir of power in the Secretary of War" to act "independent of the wage and hour provisions of any other statute"; that under this concept the only limitations on the Secretary's power would be "an executive order issued by the President," and the provisions of Section 4 (b) of the Act (5 U. S. C. A. 189 [a]) limiting the working hours of laborers and mechanics in the plants directly operated by the War Department to eight hours per day or forty hours per week, unless overtime is paid at one and one-half times the regular rate (174 Fed. [2] 718, l. c. last two paragraphs 727 and first paragraph 728). It then rules that if the Secretary of War had such plenary powers as above suggested, the Walsh-Healey Act is controlling "because the War Department in its contract with the operator of the plant specifically made the provisions of the Act (Walsh-Healey) applicable to the wage and overtime rights of the employees." And if, on the contrary, the Secretary of War did not have such plenary powers, then the Walsh-Healey Act and not the Fair Labor Standards Act "is controlling here as a matter of general application in the field involved" (l. c. 728).

This whole thesis is in our judgment untenable for the following reasons:

1. In respect to the first alternative, the prime contract did not specifically make the Walsh-Healey Act applicable. It merely complied with Section 1 of the Walsh-Healey Act (41 U. S. C. A. 35). That section required that in all public contracts for the manufacturing or furnishing of materials, etc., in an amount exceeding $10,000 there shall "be included the following representations and stipulations." Then follow the stipulations that appear in this contract (Deft. Ex. 20, Article III-D, R. 783). Since this contract was of the type defined in Section 1 of the Walsh-Healey Act, the inclusion of these stipulations was mandatory. Their inclusion had no other significance. Certainly complying with the law in this respect does not indicate any intention to exclude coverage of the Fair Labor Standards Act in respect to employees who are within its terms. Respondent did not so understand it and did not so interpret the inclusion of these stipulations in the contract. Respondent expressly stated in its booklet declaratory of its policy that it was operating under **both** Acts (Plff. Ex. C-3, R. 206).

2. To so construe the prime contract would conflict with Executive Order No. 9301 signed by the President February 9, 1943, and in effect throughout the war (8 Fed. Reg. 1825), quoted in full (R. 1021-2). The concurring opinion below admits that any action by the Secretary of War under the Act of July 2, 1940, would be subject to the Executive Orders of the President (174 Fed. [2] 718, l. c. 727). This Executive Order directed the six-day minimum wartime work week in the war plants, and specifically provided that it should not be construed as suspending or modifying "any provisions of the Fair Labor Standards Act * * * nor any other Federal, state or local law relating to the payment of wages or overtime." The construction placed on the prime contract by the Court below would nullify this Executive Order.

3. The other alternative suggested in the concurring opinion that if the Walsh-Healey Act was not made exclusively applicable by the Secretary of War under his extraordinary powers, then it is "controlling as a matter of general application in the field involved" would seem to be intended as a concurrence in Judge Collet's opinion. This opinion we have endeavored under Point I, supra, to demonstrate to be untenable, and for the reasons we have stated we submit that the Walsh-Healey Act is not controlling to the exclusion of the Fair Labor Standards Act. Neither Act is exclusive of the other. As this Court said in Brooks v. U. S., supra, 93 L. Ed. 884, at page 887:

> "We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so."

4. The whole concept of the concurring opinion is basically unsound because the Act of July 2 did not suspend the Fair Labor Standards Act.

A. The 1940 Act mentions labor standards in only two places. Section 1 (a) and 5 provide that contracts with manufacturers under the new law, which would otherwise be subject to the Walsh-Healey Act, shall not be exempt from that Act because made without advertising, and Section 4 (b) requiring the payment of overtime "to laborers and mechanics employed by the War Department."

The reference to the Walsh-Healey Act was due entirely to an amendment offered by Senator Wagner. He pointed out that the Walsh-Healey Act only applied to contracts let after advertisement and bidding, whereas this National Defense Act contemplated contracts to be let "without advertising." 50 U. S. C. A., War Appendix, §1171. And Senator Wagner was concerned lest the Walsh-Healey Act would be held not to apply to such contracts. He ex-

plained this on the floor of the Senate as follows (Cong. Record, Vol. 86, Part 7, p. 7924, June 11, 1940):

> "Unless this amendment is adopted, we should have this anomalous situation: under a contract entered into with the Government as the result of public bidding one set of minimum wages, that is, the prevailing wages, would be applied, whereas under another contract entered into as a result of negotiations, a much lower minimum wage would be paid, that is, the flat minimum **under the Wage and Hour Act.**"

We submit that the language just quoted makes it clear that the Senate acted on the Wagner amendment on the assumption that without it employees producing goods under contracts such as the one involved in this case would be subject **only** to the "Wage and Hour Act" meaning, of course, the Fair Labor Standards Act.

Section (b) of the July, 1940 Act, 5 U. S. C. A. 189 (a), has no reference to these petitioners or to this plant. It applied only to plants operated directly by the War Department and then only to "laborers and mechanics". A "laborer" is one who labors in a toilsome occupation that requires strength rather than skill (Webster's Unabridged Dictionary). A "mechanic" is one who is employed in one of the mechanical arts requiring the use of materials or tools (Webster's Unabridged Dictionary). This expression "laborers" and "mechanics" has persisted in Federal statutes since prior to 1900 (see 40 U. S. C. A. 321, 324, 325, 326). It is fair to assume that as used in this Act of July 2, 1940, this expression has the same meaning that has been ascribed to it in previous acts and therefore does not include petitioners (See Ellis v. United States, 206 U. S. 246, 51 L. Ed. 1049 [excluding masters, mates, engineers, firemen]; 1912 Op. Atty. Gen. 583 [excluding seamen]; Breakwater v. United States, 183 F. 112

[excluding seamen]; Gordon v. United States, 31 Ct. Cl. 254 [excluding watchmen]; Swisher v. United States, 57 Ct. Cl. 123 [excluding firemen]).

It (5 U. S. C. A. 189 a) also provided that "notwithstanding the provisions of any other law" the working hours of "laborers and mechanics" employed "by the Department of the Army" shall be eight hours per day, or forty hours per week, with a proviso that such hours may be exceeded under regulations prescribed by the Secretary of the Army, but that compensation for the overtime computed at not less than one and one-half times the regular rate "shall be paid to such laborers and mechanics". The purpose of this Section was to provide for payment of overtime to this group of Government employees. Existing laws in effect at that time prohibited overtime payments to Government employees. See Section 5 of the Act of March 3, 1893, as amended; 30 Stat. 316, 5 U. S. C. A. 29; also Act of March 3, 1931; 46 Stat. 1482, 5 U. S. C. A. 26-a, relating to Saturday work. Congress has subsequently provided overtime compensation for Government employees. See joint resolution of December 22, 1942, 56 Stat. 1068, and see notes to 5 U. S. C. A., Sections 26 b and 29 a. At that time, however, there were laws in effect which prohibited payment of such overtime, and hence the use by Congress of the above language to make the intent clear that the mechanics and laborers to be employed by the Department of the Army were to receive time and a half for overtime.

It is submitted that neither of the above provisions in reference to labor standards contained in the Act of July 2, 1940 indicate any intention to exclude or supersede the Fair Labor Standards Act.

Repeal or suspension of a statute by implication is not favored. A law with no express repealing clause will

not be construed as repealing a prior law unless the two are so clearly repugnant that no other conclusion can reasonably be drawn. Posadas v. National City Bank, 296 U. S. 497; West India Oil Co. v. Domenech, 311 U. S. 20; United States v. Borden Co., 308 U. S. 188; United States v. Jackson, 302 U. S. 628; United States v. Burroughs, 289 U. S. 159; General Motors Corp. v. United States, 286 U. S. 49; Indiana Mfg. Co. v. Koehne, 188 U. S. 681; United States v. Hemmer, 241 U. S. 379; United States v. Noce, 268 U. S. 613; Cope v. Cope, 137 U. S. 682; Wilmot v. Mudge, 103 U. S. 217; Red Rock v. Henry, 106 U. S. 596.

B. The Act of July 2, 1940, specifically suspends certain other statutes that it was intended to supersede. Thus, Section 1 (a) provided for the suspension of Sections 1136 and 3734 of the Revised Statutes and of "any statutory limitations with respect to the cost of any individual project or construction." Section 2 (a) suspended all "existing limitations" on the number of certain air corps personnel, and Section 3 suspended "all existing limitations" with respect to the number of aircraft. Further, Section 1 (b) authorized the Secretary of War to provide for the operation and maintenance of plants or facilities and to sell or lease such plants or facilities "without regard to the provisions of Section 321 of the Act of June 30, 1932." Also, Section 2 (b) permitted the Secretary of War to assign enlisted men and officers "irrespective" of the provisions of the National Defense Act of June 3, 1916. Under Section 4 (a) he was authorized to remove from the classified civil service any employee of the Military Establishment "notwithstanding the provisions of Section 6 of the Act of August 24, 1942," and certain other employees could be hired "without regard to the requirements of civil service laws, rules or regulations." Further, in Section 1 (a) Congress provided that "the cost-plus-a-percentage-of-cost system of contracting shall

not be used under this section" by the Secretary of War, thereby suspending certain statutes which had permitted purchases by means of that system.

The Act did not, however, contain any provision suspending the Fair Labor Standards Act, and it is submitted that this failure to specifically exclude the Fair Labor Standards Act, coupled with the specific suspension of other statutes, clearly indicates that suspension of the Fair Labor Standards Act was not intended.

Further, the legislative history of the 1940 Act negatives any intention to suspend the Fair Labor Standards Act, to-wit: The House Committee on Military Affairs listed and explained the statutes which would be suspended by the 1940 Act (H. Rept. 2261, 76 Cong., 3rd Sess. 1940), and a member of that Committee enumerated on the floor of the House the statutes which would be suspended (86 Cong. Rec. 6828). In neither case was the Fair Labor Standards Act mentioned.

The governmental agencies directly concerned with the July, 1940, Act did not consider it suspensive of the Fair Labor Standards Act. The War Department in September, 1940, expressed the opinion that employees working at ordnance plants, such as the one operated by respondent in this case, were covered by the Fair Labor Standards Act (see letter of Secretary of War to the Comptroller General dated August 25, 1942. Full text of this letter appears on page 13 [footnote] of the brief for the United States filed by the Solicitor General in Kennedy v. Silas Mason Co., 334 U. S. 249). The Comptroller General advised the War Department that it would approve for reimbursement overtime payments made by cost-plus-a-fixed-fee contracts pursuant to the Fair Labor Standards Act (22 Comp. Gen. 277, 278 and 279; 23 Comp. Gen. 439 and 444).

As further indicating that it was not the intention of the July, 1940, Act to curtail in any way the social gains that had been made for labor's benefit, we cite President Roosevelt's radio broadcast on May 26, 1940, in reference to the Defense Program, when he made the following statements:

> "But as the program proceeds there are several things we must continue to watch and safeguard, things which are just as important to the sound defense of a Nation as physical armament itself. • • • We must make sure in all we do, that there is no break-down or cancellation of any of the great social gains which we have made in these past years. • • • There is nothing in our present emergency to justify making the workers of our Nation toil for longer hours than now limited by statute. • • • There is nothing in our present emergency to justify a lowering of the standards of employment. Minimum wages should not be reduced. • • • There is nothing in our present emergency to justify a breaking down of old-age pensions or unemployment insurance. • • • the policy and laws providing for collective bargaining are still in force (86 Cong. Rec. App. 3243, 3244)."

This, we submit, is a clear indication of a fixed policy, in implementing the Defense Program, not to curtail in any way labor's gains under existing legislation.

For all of the above reasons we deny that the Act of July 2, 1940, in any way excluded the contemporaneous operation of the Fair Labor Standards Act, and we deny that any executive action of the Secretary of War or the President curtailed the rights of Labor under the Fair Labor Standards Act (Executive Order No. 9301, supra).

IV.

"Commerce" and "Goods."

SPECIFICATION OF ERRORS NOS. 6 AND 7.

Summary of Argument, Points II, III and IV.

While the opinion below went off on a construction of the Walsh-Healey and the July 2, 1940, Acts, we are hopeful that this Court will reverse, and it will then be necessary to decide whether or not the products of this plant were "goods" and were "produced for commerce" within the meaning of the Fair Labor Standards Act. Hence we have raised these questions in order that the entire question of coverage may be decided in this proceeding, and the conflicts between the Seventh and Fifth Circuits resolved.

Our position on these questions and the authorities on which we rely are stated in the supporting brief printed with our petition for certiorari herein (point IV, pp. 27 to 40), which we ask be now considered as our opening brief on these points. We also expect the Solicitor General to brief these points fully from petitioners' viewpoint as he did in Kennedy v. Silas Mason Co., 334 U. S. 249. We do not deem it necessary, therefore, to pursue this part of the argument further until we have heard from respondent.

CONCLUSION.

We wish to notice briefly the irrelevant suggestion that is invariably thrown out by those who would deny to petitioners the benefit of the Fair Labor Standards Act, to the effect that permitting suits of this character would subject the Government to great and unanticipated costs. This has never been established and this record supports a con-

trary inference. The straight overtime at one and one-half times the regular rate is a labor cost that the Government anticipated and expected to pay. All official statements of policy during the war, military as well as civil, were to the effect that war production would be harmed rather than helped by suspension of the overtime provisions of the Fair Labor Standards Act, and the Secretary of War and the Ordnance Department were of the opinion that the overtime provisions of the Fair Labor Standards Act applied to employees of cost-plus-a-fixed-fee contractors. This contractor, itself, in its statement of policy, professed to operate under the Fair Labor Standards Act, and the Secretary of War and the Ordnance Department were of the opinion that the Act applied (see letter of the Secretary of War to the Comptroller General dated August 25, 1942, 22 Comp. Gen. Dec. 277, 278 and 279), so that in so far as these judgments included straight overtime, it is a labor cost that the Government fully anticipated that it would have to meet.

The liability for liquidated damages and attorneys' fees was directly and solely caused by the contractor's violation of Section 16 (b) of the Fair Labor Standards Act, and we do not think it is reimbursable. The prime contract (R. 786-7) required the contractor to "obey and abide by" all applicable laws, regulations, or other rules of the United States, or of any other duly constituted public authority. The liability for liquidated damages and attorneys' fees resulted from the refusal of the contractor to obey and abide by the Fair Labor Standards Act and the President's Executive Order No. 9301. We can see no theory upon which this part of the liability would be reimbursable and we submit, therefore, that any suggestion that ultimate liability for the liquidated damages and attorneys' fees must be borne by the United States is not only an irrelevancy, but is wholly unwarranted.

We ask that the decision of the Court of Appeals be reversed, and that the judgment of the District Court be affirmed, with allowance of counsel fees to petitioners' attorney in this Court and in the Court of Appeals, or appropriate directions for such allowance.

Respectfully submitted,

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